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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 298

ISBRANDTSEN COMPANY, INC., MICHAEL GOLODETZ, NATHAN GOLODETZ, ABRAM G. GOLODETZ, JOACHIM GINZBERG, SIMON GOLODETZ, LAZAR GOLODETZ, MARK GINZBERG, JURA GINZBERG and EFRIM GOLODETZ, co-partners doing business under the firm name and style of M. GOLODETZ & COMPANY, ANTONY GIBBS & CO., INC., SOLEDAD TRADING CORPORATION, L. W. & P. ARMSTRONG, INC., MENTE & CO., INC. and AMERICAN SUGAR REFINING COMPANY,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

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OCTOBER TERM, 1956.

No. .....

ISBRANDTSEN COMPANY, INC., MICHAEL GOLODETZ, NATHAN GOLODETZ, ABRAM G. GOLODETZ, JOACHIM GINZBERG, SIMON GOLODETZ, LAZAR GOLODETZ, MARK GINZBERG, JURA GINZBERG and EFRIM GOLODETZ, co-partners doing business under the firm name and style of M. GOLODETZ & COMPANY, ANTONY GIBBS & CO., INC., SOLEDAD TRADING CORPORATION, L. W. & P. ARMSTRONG, INC., MENTE & CO., INC. and AMERICAN SUGAR REFINING COMPANY,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit affirming the decision and judgment of the United States District Court for the Southern District of New York which dismissed the complaints herein under Rule 12 of the Federal Rules of Civil Procedure.

Opinion Below.

The opinion of the United States District Court for the Southern District of New York is reported at 123 F. Supp. 819. The opinion of the United States Court of Appeals for the Second Circuit, a copy of which is printed in Appendix A, is reported at 233 F. 2d 184.

Jurisdiction of This Court.

The judgment of the District Court was dated February 24, 1954 and entered February 25, 1954. The judgment of the Court of Appeals was dated and entered on May 9, 1956. A copy is printed in Appendix B.

The statutory provision conferring on this Court jurisdiction to review the judgment and decision in question is 28 U. S. C. A. 1254 (1).

Question Presented.

Does the Tucker Act rather than the Suits in Admiralty Act give the District Court jurisdiction in an action against the United States for breach of its contract to procure insurance on petitioners' goods against loss by fire while ashore at a port of refuge, the goods then being enroute from Calcutta to New York?

Statutes Involved.

The statutes involved are the Tucker Act, 28 U. S. C. A. 1346(a)(2), 2401(a) and the Suits in Admiralty Act, 46 U. S. C. A. 741-742. They are set forth as far as applicable in Appendix C.

Statement of the Case.

Although the complaints[1] were not answered, there is no dispute as to the following facts therein stated:

The merchandise described in the complaints, of which the petitioners were the consignees and owners, was shipped from Calcutta to New York and transported in common carriage by the respondent on its vessel, the SS. *Mormacmar*. The vessel encountered heavy weather during the voyage and put into Wellington, N. Z. as a port of refuge where the cargo was discharged by the respondent and temporarily placed by it in a shore warehouse. That gave rise to the declaration and statement of a general average. As bailee of the cargo the respondent was under the admitted contractual duty and obligation to arrange, place and procure for the protection and benefit of the petitioners specific and special insurance on the cargo against the risk of fire and other hazards while discharged from the vessel and ashore, yet it failed to do so. The cargo was lost or damaged by fire in the warehouse on February 21, 1943.

The petitioners sued under the Tucker Act for damages arising out of the respondent's failure to arrange, place and procure the aforesaid insurance, as the result of which they were deprived of a recovery from an insurer against the specific risk of fire ashore. *The complaints do not allege a cause of action for physical loss and damage to the merchandise.* Had they been so framed, the Suits in Admiralty Act would have controlled.

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[1] Folios 16-29 of the record below.

Jurisdiction of the Court of First Instance.

The jurisdiction of the court of first instance is the Tucker Act. These suits, fourteen in number and for less than $10,000 each were commenced on February 3rd and 4th, 1949 which was less than six years after accrual of the cause of action, i. e. February 21, 1943. They were consolidated for the purposes of hearing and determining the appeal below.

Argument.

In here holding that "* * * the carrier's obligation to insure was a maritime obligation the breach of which by the United States created subject-matter for suit within the exclusive jurisdiction created by the Suits in Admiralty Act * * *"[2], the Court of Appeals is in direct conflict with the Fifth and Ninth Circuits and the Court of Claims and its own prior decisions cited *infra*. Without exception they hold a contract to insure is non-maritime and is not cognizable in admiralty, jurisdiction lying solely on the civil side of the court.

Furthermore, the question presented of itself raises an important point of federal law which has not been but should be settled by this court. With the complete accord, until this case, in all the circuits where it had been decided, that such a contract is non-maritime, apparently no occasion arose for this court to pass on the question. Now with the Second Circuit taking a view opposite to that of the others and of its own prior decisions, this question becomes acute and of prime importance.

While here the issue is whether the suit against the United States is controlled by the Tucker Act, affording

[2] Pages 13-14, Appendix A.

a remedy at law, or the Suits in Admiralty Act, where admiralty governs, a determination by this court will also settle the law for the many interests engaged in marine ventures such as common and private carriers, shipowners, shippers, consignees, charterers, shipbuilders, repairers and bankers. It will guide and protect them in making and, if need arises, in enforcing in the proper forum, their contracts such as charters, bills of lading, building and repair contracts, letters of credit and other agreements which provide, as they so often do, that one of the parties is to procure insurance for the benefit of other interested persons, and a breach thereof occurs. This is so because an aggrieved party does not have a choice of suit either at law or in admiralty. He must choose one or the other. If he sues at law he now risks being dismissed because a suit in admiralty only is permissible; if he sues in admiralty he may be told he should have sued at law.

The Court of Appeals erred in departing from the principle heretofore stated by this court[3] that a non-maritime contract does not become maritime by reason of its connection with a marine matter. In addition it also failed to follow its own prior decisions directly on the point of procuring insurance by saying that the "* * * duty as to port-of-refuge insurance, bottomed as it is on the Carriage of Goods by Sea Act, is subject-matter cognizable in admiralty."[4]

Judge Learned Hand, writing the unanimous decision of that court in *Osterhoudt* v. *Hedger Transp. Co.*[5] said:

> "* * * Rightly or wrongly we are committed to the doctrine that the breach of a promise to insure,

[3] *Plummer* v. *Webb*, quoted from in *D. C. Andrews & Company, Incorporated* v. *The United States*, footnote 6, *infra*.

[4] Page 15, Appendix A.

[5] 54 F. 2d 282, 284.

> even when an incident to a contract otherwise strictly maritime, is not justiciable in the admiralty. * * *"

In *D. C. Andrews & Company, Incorporated* v. *The United States*,[6] the Court of Claims, quoting Judge Story as its authority, said:

> "Contrary to the Government's contention herein, non-maritime portions of otherwise maritime contracts may be severed and in fact must be, since the admiralty court will not take jurisdiction of causes of action arising out of them. Furthermore if the suit is on the whole contract, part of which is non-maritime and part maritime, the admiralty court will dismiss the libel. In Plummer *v.* Webb, 19 Fed. Cas. pages 891, 894, No. 11,233, 4 Mason 380, Judge Story noted that the contract in suit contained obligations of both maritime and non-maritime nature. He said:
>
> > 'In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction, that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime. * * * In such a mixed contract the whole would most appropriately belong to a court of common law. * * * *'"

Thus the fact that the contract for carriage of the goods was maritime does not change the non-maritime character of the contract to insure them.

The decision in *Osterhoudt* v. *Hedger*, *supra*, expressed the established law in the Second Circuit which, up to the time of the instant cause, had not been departed from. Thirty-five years ago the eminent jurist Judge Hough

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[6] 124 F. Supp. 362, 365.

stated in *Virginia-Carolina Chemical Co.* v. *Chesapeake Lighterage & Towing Co., et al.*:[7]

> "* * * for, if the suit be regarded as one to recover damages for a failure to insure or procure insurance, admiralty has no jurisdiction; the contract is not maritime. Marquardt *v.* French (D. C.) 53 Fed. 603, approved United, etc., Co. *v.* New York & Baltimore, etc., Line, 185 Fed. 386, 390, 107 C. C. A. 442."

The Fifth Circuit in *Koch-Ellis Marine Contractors, Inc.* v. *Phillips Petroleum Company*,[8] said:

> "* * * if it is intended to assert affirmatively in the answer the counterclaim which was asserted in the cross-bill, the non-maritime claim for damages from a breach of a contract to insure, it may not be so asserted. * * *"

The Ninth Circuit in *Home Ins. Co., New York* v. *Merchants' Transp. Co.*,[9] said:

> "* * * But a contract to procure marine insurance is not enforceable in admiralty. Marquardt *v.* French (D. C.), 53 F. 603. Nor is a contract by a carrier by water to procure insurance on goods received for transportation a maritime contract * * *".

The Court of Claims in *D. C. Andrews & Company, Incorporated* v. *The United States, supra*,[10] said:

> "* * * In this connection, however, it should be remembered that contracts to *procure* insurance for a vessel are non-maritime and not cognizable in a court of admiralty. Reliance Lumber Co. *v.* Rothschild, D. C., 127 F. 745."

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[7] 279 Fed. 684, 686.

[8] 219 F. 2d 520, 523.

[9] 16 F. 2d 372, 373.

[10] 124 F. Supp. at 363.

The respected admiralty judge Addison Brown in *Marquardt* v. *French* (D. C. N. Y.)[11] sixty-three years ago enunciated the principle a contract to procure insurance in a marine venture is nevertheless non-maritime and unenforcible in admiralty. He said:

> "* * * But a contract or obligation to procure insurance, such as I find this obligation to have been, is not a contract of insurance, nor is it a maritime contract. It is upon the other side of the line dividing contracts which are maritime from those which are not maritime. * * * But as the agent's express contract or obligation in this case, viz. to procure insurance, was not itself a maritime contract, manifestly the mere breach of that contract is not maritime, and hence not within the jurisdiction of this court. * * *".

The District Courts[12] have uniformly followed that case and the appellate court decisions cited *supra*. Resolution by this court of the conflict is of tremendous importance to the marine industry as it will clarify and settle the maritime law.

Apart from respondent's admission that this suit involves a contract[13] the respondent, when contracting to carry petitioner's goods, incorporated the Government form of bill of lading[14] which provided that in the event of a general average it was to be settled according to the York-

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[11] 53 Fed. 603, 606-607.

[12] *The City of Clarksville* (D. C. Ind.), 94 Fed. 201, 205; *The D. T. Gilmartin* (D. C. N. Y.), 66 F. Supp. 382, 384; *Warner* v. *The Bear* (D. C. Alaska), 126 F. Supp. 529, 531.

[13] Folio 54 of the record below.

[14] Warshiplading 7/16/42 (Federal Register, Section 301:11, Title 46 C. F. R. Cum. Supp., 11336).

Antwerp Rules[15]. The respondent has not at any point in this litigation denied nor can it deny that in the situation here presented it was obligated to insure the goods while ashore against the risk of fire. Basically, the obligation stems from the rules of general average and a known and admitted custom. It therefore must be assumed to have been taken into consideration by the parties in dealing with one another.[16] This Court has clearly held that these facts give rise to a contract implied in fact.[17]

---

[15] "General average shall be adjusted, stated and settled, according to Rules 1 to 15, inclusive, 17 to 22, inclusive, and Rule F of York-Antwerp Rules 1924, at such port or place in the United States as may be selected by the carrier, and as to matters not provided for by these Rules, according to the laws and usages at the port of New York * * *" (pages 272, 277 of "Compilation of Standard Contract Forms of the War Shipping Administration, U. S. Government Printing Office, 1945).

Rule 10(c) reads:

"Whenever the cost of handling or discharging cargo, fuel or stores is admissible as general average, the cost of reloading and stowing such cargo, fuel or stores on board the ship, together with all storage charges (*including fire insurance*, if incurred) on such cargo, fuel or stores, shall likewise be so admitted. * * *" (Emphasis supplied.) (Lowndes & Rudolf on General Average, Seventh Edition, Page 525.)

[16] *Robinson* v. *United States*, 80 U. S. 363, 366:

> "* * * Parties who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary."

[17] *Baltimore & Ohio Railroad Company* v. *United States*, 261 U. S. 592, 597:

> "* * * an agreement 'implied in fact', founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding * * *."

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated: August 1, 1956.

Respectfully submitted,

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Appendix A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 117—October Term, 1955.

(Argued January 19, 1956 Decided May 9, 1956.)

Docket No. 23772

ISBRANDTSEN COMPANY, INC., MICHAEL GOLODETZ, NATHAN GOLODETZ, ABRAHAM G. GOLODETZ, JOACHIM GINZBERG, SIMON GOLODETZ, LAZAR GOLODETZ, MARK GINZBERG, JURA GINZBERG and EFIM GOLODETZ, co-partners doing business under the firm name and style of M. GOLODETZ & COMPANY, ANTHONY GIBBS & CO., INC., SOLEDAD TRADING CORPORATION, L. W. & P. ALMSTRONG, INC., MENTE & CO., INC., and AMERICAN SUGAR REFINING COMPANY,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

MEDINA, HINCKS and WATERMAN,

Circuit Judges.

Appeal from orders and judgments of the United States District Court for the Southern District of New York, Edward A. Conger, Judge. Affirmed.

ARTHUR O. LOUIS, New York, N. Y. (Hill, Rivkins, Middleton, Louis & Warburton, New York, N. Y.; Joseph T. McGowan, of counsel), for plaintiffs-appellants.

WILLIAM H. POSTNER, Attorney, Department of Justice, for defendant-appellee (Warren E. Burger, Assistant Attorney General, and Paul A. Williams, United States Attorney, attorneys for defendant-appellee; Leavenworth Colby and E. Robert Seaver, Attorneys, Department of Justice, of counsel).

HINCKS, Circuit Judge:

This is a consolidated appeal from orders in fifteen actions at law brought against the United States under the Tucker Act, each seeking to enforce liability based upon the same facts relating to the defendant's ownership and operation of SS. *Mormacmar*. In each case below the complaint was dismissed for lack of jurisdiction under the Tucker Act upon an opinion, 123 F. Supp. 819, holding that, because the complaints were based upon subject-matter of a maritime nature, the United States was suable only in admiralty under the Suits in Admiralty Act, 46 U. S. C. A. §742, which authorized such suits only when brought within two years of the accrual of the cause of action. The appeal is taken only from so much of the orders as dismissed the first cause of action stated in each complaint: no appeal has been taken from the dismissal of the second causes of action.

The basic facts upon which the asserted liability depends are recited in the opinion below. We will not repeat the recital. We refer also to the recital of facts contained in our earlier opinion in *L. W. & P. Armstrong, Inc.* v. *The Mormacmar*, 196 F. 2d 752. That was an appeal from an order in an admiralty suit brought by one of the appellants herein against the United States and others seeking to

enforce liability for the same casualty which gave rise to the instant actions. The third cause of action dealt with in that opinion was substantially the same as the first cause of action in the complaints herein.

This first cause of action which the appellants claim was wrongly dismissed alleged in substance that the defendant "as bailee of the cargo, as a matter of invariable and established custom and practice, was under the contractual duty and obligation implied in fact and in law to * * * provide for the protection and benefit of plaintiffs * * * insurance on the said cargo as a special risk against the risks of fire * * * while discharged from the vessel and ashore" as a necessary incident to the drydocking and repair of the vessel in a port of refuge; and that it "failed to perform its said contractual obligation." The appellants insist that under these allegations the gravamen of their first cause of action is not for physical loss and damage to the cargo, which concededly would constitute subject-matter within the exclusive jurisdiction of the admiralty court under the rule of *Johnson* v. *U. S. Shipping Board*, 280 U. S. 320, but for breach of a contract to effect insurance. Such a contract, they contend, is non-maritime in nature and hence not within the jurisdiction of admiralty.

We think our decision in *Armstrong* v. *Mormacmar*, *supra*, leaves no room for that contention. In that case it was held below by Judge Medina, then sitting as a district judge (*The Mormacmar*, 75 F. Supp. 520), that the carrier's duty to insure was one imposed by the Carriage of Goods by Sea Act, 46 U. S. C. A. §1303(2). Judge Medina then disposed of the case on the merits. On appeal, this court affirmed on the merits. Both below and on appeal there was no discussion of the maritime nature of the obligation which had been breached and no express finding that it was indeed maritime. But we think that in the case here Judge Conger was right in concluding that the exercise of jurisdiction in admiralty in the *Armstrong* case imported such a finding. If, as to that, there be any doubt, we now expressly hold that in the circumstances of this case the

carrier's obligation to insure was a maritime obligation the breach of which by the United States created subject-matter for suit within the exclusive jurisdiction created by the Suits in Admiralty Act. For we agree with the conclusion expressly stated, first by Judge Medina below and then by Judge L. Hand in his concurring opinion in the *Armstrong* case, that the obligation was imposed as an inseparable incident to the contract of carriage by the Carriage of Goods by Sea Act, 46 U. S. C. A. §1302(2). Being an obligation thus attaching to the maritime contract of carriage there is no room for implication that the obligation arose from a non-maritime contract voluntarily entered into. It was held in *Archawski* v. *Hanioti*, —— U. S. ——, decided April 9, 1956,—a case involving a libel to recover passage fare paid and wrongfully retained, that the subject-matter was maritime because it was "plain in the context that the obligation to pay the moneys arose because of a breach of the contract to transport passengers," and further, that "The truth is that in a case such as the present one there is neither an actual promise to repay the passage moneys nor a second contract." In the case before us the obligation to insure, in its factual context, was an integral part of a maritime contract of carriage and there was no actual promise to insure and no collateral, second, contract to insure.

The case of *Virginia-Carolina Chemical Co.* v. *Chesapeake Lighterage & Towing Co.*, 279 F. 684, on which appellants rely, is not apposite to the situation here. For under the facts of that case the carrier was under no statutory obligation to insure against the risk which matured into the loss. Indeed, that case and many others cited by appellants antedated the Carriage of Goods by Sea Act. Likewise, as to *Cory Bros. & Co. Limited* v. *United States*, 2 Cir., 51 F. 2d 1010. *Minturn* v. *Maynard*, 17 How. 477, is far afield.

The appellants cite *United States* v. *Atlantic Mutual Insurance Co.*, 298 U. S. 483, for the proposition that a general average contribution is enforceable against the United States in an action at law. As we said in *Prudential*

Steamship Corp. v. *United States*, 220 F. 2d 655, we think that holding was limited to cargo carried on a *public* vessel as distinguished from one "employed as a merchant vessel." We adhere to our holding there expressed that under *Johnson* v. *United States Shipping Board*, 280 U. S. 320, exclusive jurisdiction over general average suits against the United States is conferred on the district courts by the Suits in Admiralty Act. But even if in this we are mistaken, we should still hold that in the situation here the appellee's duty as to port-of-refuge insurance, bottomed as it is on the Carriage of Goods by Sea Act, is subject-matter cognizable in admiralty.

Affirmed.

Appendix B.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of May one thousand nine hundred and fifty-six.

Present:

Hon. HAROLD R. MEDINA,
Hon. CARROLL C. HINCKS,
Hon. STERRY R. WATERMAN,
Circuit Judges.

ISBRANDTSEN CO., INC., *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

Appendix C.

Tucker Act.

28 U. S. C. A. 1346 (a)(2) and 2401(a).

§1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

* * * * * *

§2401. Time for commencing action against United States.

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

* * * * * *

Suits in Admiralty Act.

46 U. S. C. A. 741-742.

§741. Exemption of United States vessels and cargoes from arrest or seizure.

No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or oper-

ated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this chapter shall not apply to the Panama Railroad Company.

§742. Libel in personam.

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. * * *.

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Tucker Act, 28 U. S. C. 2401 (a) 6, 8

Miscellaneous:

Lowndes & Rudolf's, *General Average and the York-Antwerp Rules* (8th ed., 1955) 436, 437, 439 10

York-Antwerp Rules, 1924, Rule X (c) 10

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 298

ISBRANDTSEN CO., INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 36–42) is reported at 123 F. Supp. 819. The opinion of the United States Court of Appeals for the Second Circuit (Pet. 11–15) is reported at 233 F. 2d 184. For opinions in a related case, see *The Mormacmar*, 75 F. Supp. 520; *L. W. & P. Armstrong, Inc.* v. *The Mormacmar*, 93 F. Supp. 930 (S. D. N. Y.), affirmed, 196 F. 2d 752 (C. A. 2).

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1956 (Pet. 16). The petition for a writ of certiorari was filed on August 2, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a claim against the United States for breach of a duty, under a maritime contract of carriage, to insure the cargo involved is subject to the two-year limitations period of the Suits in Admiralty Act.

STATUTES INVOLVED

1. The Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, provides in pertinent part:

Section 1 (41 Stat. 525, 46 U. S. C. 741):

> * * * That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or of such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this Act shall not apply to the Panama Railroad Company.

Section 2 (41 Stat. 525, 46 U. S. C. 742):

> * * * That in cases where if such vessel were privately owned or operated, or if such cargo

were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. * * *

Section 5 (as amended by the Act of December 13, 1950, 64 Stat. 1112, 46 U. S. C. 745):

> * * * That suits as herein authorized may be brought only within two years after the cause of action arises * * *

2. The Carriage of Goods by Sea Act of April 16, 1936, 49 Stat. 1207, provides in pertinent part:

Section 3 (49 Stat. 1208, 46 U. S. C. 1303):

* * * * *

> (2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

* * * * *

> (6) In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered * * *.

STATEMENT

1. *The facts.* The circumstances which gave rise to this litigation were stated succinctly by Judge Augustus N. Hand in *L. W. & P. Armstrong, Inc.* v. *The Mormacmar*, 196 F. 2d 752, 753 (C. A. 2), as follows:

> * * * The Mormacmar sailed from Calcutta on December 24, 1942 and arrived at Wellington, N. Z., on January 30, 1943.[1] While at Wellington, repairs of a temporary nature were made on the after peak tank in which leaks had been discovered prior to the vessel's arrival at that port. The vessel left Wellington on February 5, 1943 and soon after her departure new leaks were discovered. Because of the lack of sufficient fresh water for the long voyage to the Panama Canal, the master decided to return to Wellington as a port of refuge. The vessel arrived there on February 7, 1943 and a general average was declared. On the next day part of the cargo * * * was discharged and placed in warehouses so that the vessel might be lightened for drydocking. Reloading of the cargo commenced on February 21, 1943 after the repairs were completed. During the evening of the 21st a fire broke out in one of the warehouses in which the cargo was stored * * *.

The fire destroyed a part of the cargo owned by the petitioners (R. 8, 38). No fire insurance had

[1] At that time, the United States was the owner of the *Mormacmar* (R. 6). (Footnote supplied.)

been taken out for the cargo while it was stored in the warehouses (R. 8, 38).[2]

2. *L. W. & P. Armstrong, Inc.* v. *The Mormacmar.*[3] In September 1944, L. W. & P. Armstrong, Inc. (hereafter referred to as Armstrong), one of the petitioners herein, filed a libel in admiralty based on the destruction of 41 bales of gunnies. The libel charged (1) non-delivery, (2) unseaworthiness and deviation, and (3) failure to insure the goods while placed ashore. In October 1947, the district court dismissed the first two causes of action of the libel. It held, however, that the carrier's duty under Section 3 (2) of the Carriage of Goods by Sea Act (*supra*, p. 3) to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried" included the duty to insure the goods against fire while ashore, and referred the case to a Special Master to determine the damages (75 F. Supp. 520).

When the Master's report disclosed that Armstrong's loss had been covered fully by insurance, the complaint was dismissed (93 F. Supp. 930). On appeal, the court's opinion affirmed on that ground (196 F. 2d 752). Judge Learned Hand, concurring,

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[2] In the related case of *L. W. & P. Armstrong, Inc.* v. *The Mormacmar*, it was found that the failure to insure the cargo placed ashore was explained by communication difficulties during the early stages of the war and by the fact that most of the cargo consisted of non-combustible ores. *The Mormacmar*, 75 F. Supp. 520, 521 (S. D. N. Y.).

[3] It appears appropriate to give a short outline of that case, the forerunner of this litigation, especially since the opinions of both courts below refer to it.

pointed out that, inasmuch as the failure to insure constituted a breach of the carrier's duties imposed on it by Section 3 (2) of the Carriage of Goods by Sea Act, the claim was barred by the one-year statute of limitations of Section 3 (6) of that statute.[4] He added, "I understand that my brethren agree that the one year statute of limitations is applicable but also wish to dispose of the case on the merits" (196 F. 2d 752, 755).

3. *The present litigation.* Subsequent to the decision of the district court in the *Armstrong* case, the fifteen consolidated cases now before this Court were brought against the United States by shippers—including Armstrong—who had lost cargo in the same fire (R. 41). The complaints, alleging jurisdiction under the Tucker Act (R. 9–10, 54), were filed on or about February 4, 1949, *i. e.*, shortly before the expiration of the six-year period fixed by 28 U. S. C. 2401 (a) (R. 52, 54–55). They alleged, as a first cause of action, the Government's failure to insure the cargo, stating that "as a matter of invariable and established custom and practice, [it] was under the contractual duty and obligation implied in fact and in law" to obtain such insurance (R. 8). A second cause of action asserted unseaworthiness of the vessel and unlawful deviation (R. 9).

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[4] In this case the complaints were filed in February 1949, *i. e.*, nearly six years after the causes of action allegedly arose (R. 54–55, and cf. p. 6, *infra*). This circumstance moots any possible question whether the two-year statute of limitations of the Suits in Admiralty Act or the one-year statute of limitations of the Carriage of Goods by Sea Act is applicable.

The district court granted the Government's motion to dismiss (R. 15–28) on the ground that the complaints alleged maritime causes of action which were barred by the two-year statute of limitation of the Suits in Admiralty Act (R. 15–19, 25). It held that unseaworthiness and deviation plainly constituted a maritime claim (R. 39). And, with respect to the alleged violation of the duty to insure, it concluded that the complaint was not based on the breach of an express contract to insure—traditionally held to be non-maritime[5]—but on the violation of a duty to insure implied by law and incidental to the carriage of the cargo (R. 39–40). In reaching this conclusion, the district court relied upon the fact that the courts, in entertaining the earlier Armstrong libel, had necessarily examined and upheld the proposition that actions of this type are maritime in character.[6] So far as petitioner Armstrong was concerned, the court held further that his claim was barred by *res judicata* (R. 41).

Petitioners' appeals were limited to the question whether their failure-to-insure causes of action should have been dismissed (R. 56–57). Affirming the judgments, the court of appeals stated that the Government's duty to insure was not based on a separate undertaking to insure, but was "imposed as an insep-

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[5] See pp. 10–11, *infra*.

[6] The original opinion of the Court of Appeals for the Second Circuit in *Sword Line* v. *United States*, 228 F. 2d 344, 346, supports the argument of the district court that the court of appeals must have examined, *sua sponte*, the existence *vel non* of admiralty jurisdiction.

arable incident to the contract of carriage by the Carriage of Goods by Sea Act" and therefore constituted "an integral part of a maritime contract of carriage" (Pet. 14). Accordingly, it held, the claim was of a maritime character, within the exclusive jurisdiction of the admiralty courts, and subject to the two-year limitations of Section 5 of the Suits in Admiralty Act.

ARGUMENT

The sole question presented by the petition is whether petitioners' claims are governed by the six-year limitations of the Tucker Act or by the two-year limitations of the Suits in Admiralty Act. The decision below is correct and in accord with controlling precedent. There is no conflict.

1. Petitioners do not question that the jurisdiction conferred upon the admiralty courts under the Suits in Admiralty Act is exclusive. *Johnson* v. *Fleet Corporation,* 280 U. S. 320, 327; *Matson Navigation Co.* v. *United States,* 284 U. S. 352, 356; *Lykes Bros. S. S. Co.* v. *United States* (*Waterman S. S. Corp.* v. *United States*), 129 C. Cls. 455, 459, certiorari denied, 348 U. S. 970, 971; *Waterman S. S. Corp.* v. *United States,* 129 C. Cls. 460, certiorari denied, 348 U. S. 971; *Agricultural Insurance Co.* v. *United States,* 132 C. Cls. 807, certiorari denied, 350 U. S. 912; *Prudential S. S. Corp.* v. *United States,* 220 F. 2d 655, 659 (C. A. 2). Likewise, there is no dispute that a claim justiciable under that Act is subject to the two-year period prescribed in Section 5 (*supra,* p. 3). *Calmar S. S. Corp.* v. *United States,* 345 U. S. 446, 455; *Prudential S. S. Corp.* v. *United States,* 220 F.

2d 655, 658–660 (C. A. 2). *Sword Line* v. *United States,* 228 F. 2d 344, 230 F. 2d 75 (C. A. 2), affirmed *per curiam,* 351 U. S. 976.

The Suits in Admiralty Act (Section 2, *supra,* pp. 2–3) provides that a libel *in personam* [7] may be brought against the United States "in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained," in other words, wherever a cause of action is "characteristically within the admiralty jurisdiction." *Matson Navigation Co.* v. *United States,* 284 U. S. 352, 358. Thus, the dispute as to the controlling period of limitations depends upon the answer to this question: Is petitioners' claim one characteristically within the admiralty jurisdiction?

The theory of the complaints is that respondent, as a carrier, was under a contractual duty and obligation, implied in fact and in law, to arrange for the insurance of petitioners' cargo while placed ashore (R. 8). Both courts below found that the duty to insure was derived from the carrier's statutory duty, under Section 3 (2) of the Carriage of Goods by Sea Act, to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried" (R. 40, Pet. 14), and, accordingly, that it was an inseparable incident of the maritime contract of carriage (Pet. 14). The court of appeals expressly determined that there was no actual or collateral promise

[7] In relation to the United States, there can be no libel *in rem,* either with respect to vessel or cargo. Section 1, *supra,* p. 2.

to insure.[8] The claim thus is bottomed on the breach of a maritime contract, arising out of a transaction inherently maritime in character. If the vessel were privately owned, a proceeding in admiralty could be maintained. *Krauss Bros. Co.* v. *Dimon S. S. Corp.*, 290 U. S. 117, 124–126; *Archawski* v. *Hanioti*, 350 U. S. 532, 536; see also *American Stevedores* v. *Porello*, 330 U. S. 446, 457; *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684, 690–695. By the same token, the action falls within the exclusive jurisdiction of the Suits in Admiralty Act where the vessel is one owned by the United States. *Sword Line* v. *United States*, 228 F. 2d 344, 230 F. 2d 75, affirmed *per curiam*, 351 U. S. 976; and see *Calmar S. S. Corp.* v. *United States*, 345 U. S. 446, 454–455.

2. In support of a claim of conflict, petitioners rely upon decisions which state that the breach of a promise to insure, based upon a separable or collateral

[8] Petitioners seem to argue (Pet. 8–9) that a collateral duty to insure arose from the incorporation by reference of the York-Antwerp Rules, 1924, Rule X (c) of which provides that "storage charges (*including insurance, if reasonably incurred*)" may be included in the General Average (emphasis added). The very language of the rules indicates that insurance is permissible and not mandatory. (Cf. Lowndes & Rudolf's *General Average and the York-Antwerp Rules* (8th ed., 1955) 436, 437, 439.) The duty to insure thus arises from the Carriage of Goods by Sea Act and not from the contractual reference to the York-Antwerp Rules. In any event, we can conceive of no transaction more inherently maritime in character than a general average. *United States* v. *Atlantic Mutual Insurance Co.*, 298 U. S. 483, 489; cf. *Sword Line* v. *United States*, 230 F. 2d 75, 77 (C. A. 2), affirmed *per curiam*, 351 U. S. 976.

contract, is not justiciable in the admiralty courts.[9] From this petitioners seek to draw the inference that a breach of a duty to insure is never cognizable in admiralty. This does not follow. Indeed, the very rationale of the decisions which petitioners cite points to admiralty jurisdiction in this case. The reasoning of those cases is that, where a duty to insure is based upon an independent or collateral promise to insure, its breach does not give rise to a maritime claim because a contract to insure is not a maritime contract.[10] Assuming the correctness of this proposition,[11] it follows that, where, as here, the duty to insure constitutes an integral part of the maritime contract of carriage, the breach of this duty does give rise to a maritime claim.

The court below fully recognized the difference between a duty to insure flowing from a separate promise and a duty to insure which constitutes an inseparable and inherent incident of a maritime contract of

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[9] Cf. *Marquardt* v. *French*, 53 Fed. 603 (S. D. N. Y.); *Virginia-Carolina Chemical Co.* v. *Chesapeake Lighterage & Towing Co.*, 279 Fed. 684 (C. A. 2); *Home Ins. Co.* v. *Merchants' Transp. Co.*, 16 F. 2d 372 (C. A. 9); *Osterhoudt* v. *Hedger Transp. Co.*, 54 F. 2d 282 (C. A. 2); *Koch-Ellis Marine Contractors* v. *Phillips Petroleum Company*, 219 F. 2d 520 (C. A. 5); *D. C. Andrews & Company* v. *the United States*, 129 C. Cls. 574.

[10] See, *e. g.*, *Marquardt* v. *French*, 53 Fed. 603, 606 (S. D. N. Y.).

[11] See, however, the doubts expressed by Learned Hand, J., in *Osterhoudt* v. *Hedger Transp. Co.*, 54 F. 2d 282, 284 (C. A. 2): "*Rightly or wrongly* we are committed to the doctrine that the breach of a promise to insure, even when an incident to a contract otherwise strictly maritime, is not justiciable in admiralty. * * * *There are embarrassments in this, and to me at any rate it seems that the opposite result might have been reached without sacrifice of principle* * * *." (Emphasis added.)

carriage (Pet. 14). The decision is thus in full accord with the earlier decisions of the Second Circuit. Nor is there any conflict with decisions of the Fifth and Ninth Circuits and the Court of Claims. *Koch-Ellis Marine Contractors* v. *Phillips Petroleum Co.*, 219 F. 2d 520, 521 (C. A. 5), did not involve the duty of a carrier to insure the cargo, but an alleged oral agreement by the shipper to take out insurance for the carrier's benefit. In *Home Ins. Co.* v. *Merchants' Transp. Co.*, 16 F. 2d 372 (C. A. 9), the Ninth Circuit held that an action to recover marine insurance payments made by the underwriter under a mistake of fact was not maritime in nature although the marine insurance contract itself was enforceable in admiralty.[12] *D. C. Andrews & Company* v. *United States*, 129 C. Cls. 574, involved the question whether an action for a cargo broker's commissions was cognizable in admiralty. In all three cases, the opinions allude to the rule that admiralty has no jurisdiction over an action for damages for the breach of a contractual undertaking to *procure* insurance for a vessel;[13] none of them purports to deal with the issue here involved, *viz.*, whether admiralty has jurisdiction over the breach of a duty to insure which flows directly, by operation of law, from the maritime contract of carriage.

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[12] But see *Krauss Bros. Co.* v. *Dimon S. S. Corp.*, 290 U. S. 117; *Archawski* v. *Hanioti*, 350 U. S. 532; *Sword Line* v. *United States*, 228 F. 2d 344; 230 F. 2d 75, 76, affirmed *per curiam*, 351 U. S. 976.

[13] Cf. 219 F. 2d at 521, fn. 2; 16 F. 2d at 373; 129 C. Cls. at 576.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 298.

ISBRANDTSEN COMPANY, INC., MICHAEL GOLODETZ, NATHAN GOLODETZ, ABRAM G. GOLODETZ, JOACHIM GINZBERG, SIMON GOLODETZ, LAZAR GOLODETZ, MARK GINZBERG, JURA GINZBERG, and EFRIM GOLODETZ, co-partners doing business under the firm name and style of M. GOLODETZ & COMPANY, ANTONY GIBBS & CO., INC., SOCIEDAD TRADING CORPORATION, L. W. & P. ARMSTRONG, INC., MENTE & CO., INC. and AMERICAN SUGAR REFINING COMPANY,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF.

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Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF.

Respondent's brief effectively concedes the proposition which always has been the law on a subject of the greatest importance to those engaged in transportation and foreign trade. It is that a suit for breach of a contract to procure insurance in a maritime venture states a non-maritime cause of action and admiralty cannot take jurisdiction.

It nevertheless argues,—*unsupported by citation of a single authority*—that where the contract to insure is not an independent undertaking or is incidental to or part of a maritime contract, it becomes an admiralty cause. That contention has been struck down by this court, the Courts

of Appeal for the Fifth and Ninth Circuits, the Court of Claims, the District Courts and earlier by the Court of Appeals for the Second Circuit itself. The cases are cited and quoted from at pages 5-8 of the petition. As of today, the only court which has adopted the position taken by the respondent is the Court of Appeals for the Second Circuit and that was done only in the present litigation,—the court having previously pointedly expressed itself to the contrary.[1] Thus there now is a sharp conflict between the circuits on this important subject despite the respondent's opposite suggestion in its brief.

In the cases cited in the petition the underlying contract was maritime, yet the provisions for procuring insurance were held to be non-maritime. Those decisions uniformly hold that an obligation to insure, whether it is an incident to a maritime contract or stands alone, cannot be decided in the admiralty.

The same argument as is here presented by the respondent was made by it in D. C. Andrews & Company, Incorporated *v.* The United States[2] and emphatically rejected by the Court of Claims. (See pages 6 and 7 of the petition). That case held an agreement to procure insurance, part of a maritime contract, nevertheless was non-maritime,— precisely petitioners' position. The principal authority relied upon by the Court of Claims was Plummer *v.* Webb[3] where Justice Story said "some ingredients of a maritime nature" are not a "sufficient foundation for admiralty jurisdiction" where the contract is mixed maritime and non-maritime. He went on to say that to have admiralty jurisdiction "The substance of the whole con-

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[1] *Oosterhoudt* v. *Hedger Transp. Co.*, 54 F. 2d 282, 284.

[2] 124 F. Supp. 362, 363, 365.

[3] 19 Fed. Cas. pages 891, 894, No. 11,233, 4 Mason 380.

tract must be maritime". Here the obligation to insure indisputably was non-maritime.

Another case directly contrary to respondent's argument that to exclude admiralty jurisdiction the contract to insure must be an undertaking either independent of the underlying contract or not an incident thereof is the holding in the Second Circuit that "* * * the breach of a promise to insure, *even when an incident to a contract otherwise maritime*, is not justiciable in the admiralty. * * *"[4] (emphasis supplied).

Nor is there any factual or legal merit in the respondent's contention there is no conflict between the circuits. Not a case is cited in contradiction of petitioners' point, based on the cases cited, that with its holding in this case and its predecessor[5] the Second Circuit now is in conflict with its own commitment which it previously chose not to alter[6] and the basic law laid down by this court, the Fifth and Ninth Circuits and the Court of Claims. (See pages 6-8 of the petition.) Every one of those courts held, where the controversy involved an obligation to insure, that it was non-maritime regardless of whether it was an independent contract or an integral part of or an incident to a maritime contract.

In footnote 2, page 5, of respondent's brief an attempt is made to excuse the failure to insure. But the District Judge rejected it. He held:[7]

> "While the lack of cable communication at the time general average proceedings were set in motion

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[4] *Osterhoudt* v. *Hedger Transp. Co., supra.*

[5] *L. W. & P. Armstrong, Inc.* v. *The Mormacmar*, 75 F. Supp. 520; 93 F. Supp. 930; 196 F. 2d 752.

[6] *Osterhoudt* v. *Hedger Transp. Co., supra.*

[7] *L. W. & P. Armstrong, Inc.* v. *The Mormacmar*, 75 F. Supp. 520, 521.

> on February 17th, before the fire, may explain the failure of the general average adjusters to follow the usual custom and practice of placing such insurance, as their information indicated the cargo consisted of ore and they had no other information to go by, there were at the time in Wellington representatives of the vessel and of the respondents, Moore-McCormack Lines, Inc. and War Shipping Administration. If these representatives lacked authority to place such insurance, this lack of authority was due to the failure of respondents to take the steps which they should have taken in the premises. Furthermore, the general average adjusters, prior to the fire, communicated with the War Shipping Administration and 'pointed out to them that if there was commercial cargo involved it should be insured because it was being put ashore'."

In footnote 8, page 10, of respondent's brief Rule 10(c) of the York-Antwerp Rules, 1924, in effect in 1943 when this matter arose, is misquoted. It is there quoted as providing insurance *reasonably* incurred was a proper charge in general average. The word "reasonably" does not appear in the 1943 text.

In the same footnote respondent suggests it was a matter of its choice whether the insurance should be effected. That is not so,—it was a matter of unavoidable duty and indisputably established custom. John C. Coles, the average adjuster who prepared the statement of general average in this case, testified on the trial in L. W. & P. Armstrong, Inc. *v.* The Mormarmar, *supra:*

> "A. So then I communicated the same day with the War Shipping Administration and pointed out to them that if there was commercial cargo involved it should be insured because it was being put ashore and I wanted to arrange any insurance that was required."

* * * * * *

"Q. What kind of insurance? A. The kind of insurance you usually buy on cargo put ashore, which would cover fire, collapse of structures and rising of navigable waters. It is customary to always take out that kind of insurance in this kind of a situation. I never saw a case before where we did not have insurance—"

Conclusion.

As it abundantly appears the Court of Appeals for the Second Circuit by its decision in this case has created a serious conflict in the Circuits on an important point of civil and maritime law, certiorari should be granted and the matter passed upon by this court.

Dated: September 6, 1956.

Respectfully submitted,

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